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No. 89-1018

In the Supreme Court of the United States

OCTOBER TERM, 1989

AYUDA, INC., ET AL., PETITIONERS

v.

RICHARD THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Immigration Reform and Control Act of 1986 precludes a district court from exercising general federal question jurisdiction over a challenge to the validity of an Immigration and Naturalization Service (INS) regulation governing eligibility for legalization.

2. Whether, if the district court had jurisdiction in this case, the court erred in reviewing an asserted INS policy because the agency action in question was neither final nor ripe for judicial review.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-87a) is reported at 880 F.2d 1325. An opinion and supplemental orders of the district court (Pet. App. 88a-150a) are reported at 687 F. Supp. 650 and 700 F. Supp. 49. Additional opinions and supplemental orders of the district court (Pet. App. 151a-164a) are unreported. The opinion of the court of appeals denying a petition for mandamus (Pet. App. 166a-195a) is reported at 869 F.2d 1503.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1989. A petition for rehearing was denied on October 4, 1989 (Pet. App. 197a). The petition for a writ of certiorari was filed on December 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, "represent[ed] the most comprehensive immigration reform effort in the United States in 20 years." S. Rep. No. 132, 99th Cong., 1st Sess. 18 (1985); H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 51-55 (1986) (describing history of legislation). As an integral part of that effort, Congress established two major legalization programs that permitted certain undocumented aliens in the United States to obtain lawful resident status. The first legalization program applied to aliens who had resided continuously and unlawfully in the United States since January 1, 1982. 8 U.S.C. 1255a. The second program applied to "Special Agricultural Workers"—aliens who had performed at least 90 days of qualifying agricultural work in the United States during the 12 months ending May 1, 1986. 8 U.S.C. 1160(a).

Under the general legalization program, an alien had to submit an application during a 12-month period that was designated by the Attorney General to begin on May 5, 1987, and to end on May 4, 1988. 8 U.S.C. 1255a(a)(1)(A); 8 C.F.R. 245a.2(a). To qualify for legalization, the alien had to establish his continual unlawful residence in the United States since January 1, 1982, his continual physical presence in the United States since November 6, 1986, and his admissibility as an immigrant, and had to satisfy several other requirements. 8 U.S.C. 1255a(a)(2)(A), (3), and (4). Special rules applied to an alien who had originally entered the United States as a nonimmigrant (generally, one who entered under a visa not entitling him to permanent residency, see 8 U.S.C. 1101(a)(15)). A nonimmigrant had two ways to establish his unlawful status since January 1, 1982. First, a nonimmigrant could show that his visa had expired through the passage of time before January 1, 1982. 8 U.S.C. 1255a(a)(2)(B). Alternatively, a nonimmigrant could show that he had violated the conditions for lawful status

before January 1, 1982, and that this violation was "known to the Government." 8 U.S.C. 1255a(a)(2)(B).

b. In early 1987, the Immigration and Naturalization Service (INS) made available a working draft of regulations to implement the legalization program. See 52 Fed. Reg. 2,115. The draft included a proposed definition of the statutory phrase "known to the Government" for purposes of 8 U.S.C. 1255a(a)(2)(B). After receiving comments, INS published an expanded proposed definition in March 1987, 52 Fed. Reg. 8,753-8,754, and adopted a still more generous definition in its final rules, issued immediately prior to the opening of the application period in May 1987. 52 Fed. Reg. 16,206, 16,208.[1]

The INS rule provided that in the phrase "alien's unlawful status was known to the Government," the word "government" meant "the Immigration and Naturalization Service." 8 C.F.R. 245a.1(d). Thus, a nonimmigrant seeking to qualify for legalization by establishing that his unlawful status was "known to the Government" as of January 1, 1982, had to show that his unlawful status was "known to the INS." Detailed subparagraphs of the rule spelled out the application of the statute to such nonimmigrants. Responding to comments that the term "Government" should be interpreted more expansively to include other federal or state agencies, the INS explained its rejection of that approach.

> Pursuant to section 103 of the [Immigration and Nationality Act], only the Attorney General is charged with the administration and enforcement of the immigration laws. Correspondingly, only the Attorney General can make a determination that an alien's status is "unlawful." To interpret the word "Government" to include Federal, State, and local agencies would make the administration of [the legalization program] difficult, if not impossible, and would vest government agencies with an authority

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[1] After the application period began, the INS twice modified the rule in order further to enlarge its coverage. See 52 Fed. Reg. 43,843, 43,845 (1987) (relating to nonimmigrants on student visas whose schools reported the alien's violation of status); 53 Fed. Reg. 23,382-23,383 (1988) (expanding the same provision).

that Congress specifically granted only to the Attorney General.

52 Fed. Reg. 16,206 (1987).

c. Prior to the issuance of the final rule, a district court considered the "known to the Government" provision in hearing an alien's action to enjoin her deportation pending disposition of a legalization claim. Although noting some reservations, the district court found INS's position—that "known to the Government" meant "known to the United States Attorney General or the INS"—to be the "more persuasive" view. *Kalaw* v. *Ferro*, 651 F. Supp. 1163, 1170 (W.D.N.Y. 1987). After issuance of the final regulations, another district court hearing a motion for habeas corpus disagreed with the INS's definition and found it inconsistent with IRCA. *Farzad* v. *Chandler*, 670 F. Supp. 690 (N.D. Tex. 1987). In response to the *Farzad* decision, the INS announced that it would accept "known to the Government" applications even though they did not meet INS's definition and would grant such applicants temporary work authorization; the Legalization Offices, however, were instructed to recommend such applications for denial.

2. a. Petitioners are several organizations whose principal function is to perform immigration counseling, and five individual nonimmigrant aliens claiming to represent a class of legalization applicants in the INS Eastern and Southern Regions. On March 8, 1988, petitioners brought suit against respondents in the United States District Court for the District of Columbia challenging the INS's regulations under IRCA governing the eligibility of nonimmigrants for legalization. In particular, petitioners claimed that INS's rule defining the phrase "known to the Government" was overly restrictive and was invalid as contrary to the statute. Petitioners requested declaratory and injunctive relief against enforcement of the rule. Pet. App. 89a-90a.

After a hearing, the court ruled in petitioners' favor. The court rejected INS's contention that the organizational plaintiffs lacked standing and were barred by the

exhaustion-of-remedies doctrine from maintaining this action. The court found that the organizations' function of assisting aliens to apply for legalization was impaired by the confusion over the proper interpretation of the phrase "known to the Government," and that this impairment gave them standing to sue. Pet. App. 97a-109a.[2] The court also found exhaustion principles inapplicable because the organizations had "no administrative process to which to appeal." *Id.* at 109a. The court did not address the question whether the individual plaintiffs had standing, or whether the organizations had third-party standing to assert their members' rights. *Id.* at 109a n.9.[3]

On the merits, the court rejected the INS's "known to the Government" regulation, finding it contrary to the plain meaning of the statute. Pet. App. 111a-118a. The court issued a declaratory judgment interpreting the term "Government" in 8 U.S.C. 1255a(a)(2)(B) "to mean United States Government and not simply the INS." Pet. App. 122a. The court also granted a preliminary injunction enjoining INS from applying its regulation and requiring it to give prompt notice of the court's holding to "all persons affected by the regulation in question." *Ibid.* The court believed that such relief was needed because the application period was drawing to a close and qualified applicants had been deterred from

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[2] The court focused on the fact that at least some of the organizational plaintiffs were "qualified designated entities" under IRCA. Pet. App. 107a-109a. Such entities were created by IRCA in order to permit aliens to file legalization applications with nongovernmental intermediaries who would forward the applications to the Attorney General. 8 U.S.C. 1255a(c)(1) and 1255a(c)(2); H.R. Rep. No. 682, *supra*, Pt. 1, at 73 (explaining that such entities were designed to encourage undocumented aliens to apply for legalization without fear of exposure to the INS). The court found that IRCA's provision for "qualified designated entities" placed the organizational plaintiffs within the "zone of interests" protected by the statute. Pet. App. 107a.

[3] Although the individual petitioners moved for class certification, the district court did not act on the motion, and no class has been certified. See Pet. ii.

applying for legalization. *Id.* at 120a-121a. The court retained jurisdiction to assure compliance with its decree and to grant further relief as required. *Id.* at 122a.

b. In a series of supplemental orders, the district court addressed other issues that arose relating to the "known to the Government" provision. Pet. App. 123a-150a, 164a-165a. In its first Supplemental Order, the court sought to clarify its prior ruling by stating that an alien seeking to qualify under the "known to the Government" provision had to show that prior to January 1, 1982, "documentation existed in one or more government agencies," which, taken as a whole, established the alien's unlawful status. *Id.* at 123a. Supplemental Order II required INS to reopen the applications of aliens who had been denied legalization based on the "known to the Government" regulation, to reconsider such applications under the standard announced in the court's prior orders, and to extend the work authorization of such applicants until a final decision was reached. *Id.* at 123a-124a. Supplemental Order III granted petitioners' motion for summary judgment, made the preliminary injunction permanent, and ordered INS to waive filing fees for applicants claiming to qualify for legalization under the "known to the Government" standard. *Id.* at 124a-125a. Supplemental Order IV required INS to process legalization applications filed from abroad by certain aliens; directed INS to continue its efforts to publicize the court's order; ordered INS to grant parole to certain aliens who had left the United States as a result of the prior "known to the Government" rule; and retained jurisdiction. *Id.* at 125a-126a. The Solicitor General determined not to authorize an appeal from the court's original order construing the "known to the Government" provision or from Supplemental Orders I-IV.

c. On April 21, 1988, 11 new organizations filed a motion to intervene as plaintiffs, in order to raise a new issue regarding the interaction of former Section 265 of the Immigration and Nationality Act, 8 U.S.C. 1305

(1976), and the "known to the Government" standard.[4] Section 265 required a nonimmigrant alien to file quarterly and annual address reports with INS. 8 U.S.C. 1305 (1976). Failure to do so rendered the alien deportable unless the omission was "reasonably excusable or was not willful." 8 U.S.C. 1306(b) (1982). The intervenors contended that a failure to make a required report under Section 265 provided a basis, not recognized by INS, for establishing that a nonimmigrant's unlawful status was "known to the Government." Pet. App. 6a-7a.

After the intervenors' argument was adopted by petitioners, Pet. App. 128a-129a, the court issued Supplemental Order V addressing the Section 265 claim. Accepting petitioners' arguments, the court enjoined INS from denying legalization to aliens "who contend that they violated their nonimmigrant status * * * by failing to comply with the mandatory quarterly or annual registration requirements" of former Section 265, "if INS determines that such aliens have credibly established their willful violation of Section 265, and such aliens have also met all other applicable conditions for legalization." Pet. App. 127a. The court also ordered INS to supply relevant records, including microfilmed files, to aliens claiming eligibility under the Section 265 "known to the Government" theory. Finally, the court waived the filing fees for such applicants "until such time as this Order becomes a final binding decision or the Defendants have acquiesced in this Court's rulings." Pet. App. 127a.

3. The government appealed from Supplemental Order V, contending that the district court lacked subject matter jurisdiction and, alternatively, that INS had not formulated a policy as to Section 265 aliens that was

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[4] The proposed intervenors were immigration counseling organizations that had filed a parallel class action challenging the "known to the Government" regulation in the Western and Northern Regions of the INS. *Immigration Assistance Project* v. *INS*, 709 F. Supp. 998, later opinion, 717 F. Supp. 1444 (W.D. Wash. 1989), appeal pending, Nos. 89-35345, 89-35593 (9th Cir.).

ripe for judicial review.[5] Agreeing with both of the government's points, a divided panel of the court of appeals vacated the order. Pet. App. 1a-43a.

The court first held that the district court lacked jurisdiction to review INS's legalization regulations. Petitioners claimed that because they challenged only a general rule or policy that would be applied in subsequent cases, the district court had jurisdiction under 28 U.S.C. 1331. They contended that 8 U.S.C. 1255a(f), IRCA's judicial review provision, was not applicable to such a claim. The court of appeals rejected that argument, relying on IRCA's provision for judicial review of "a determination respecting an application" only in the review of a deportation order in the courts of appeals. 8 U.S.C. 1255a(f)(1) and (4). The court explained that since an alien could later contest the validity of a regulation in the fashion set forth in IRCA—in review of a deportation

[5] While the appeal was pending, litigation proceeded apace in the district court. The court issued Supplemental Orders VI (requiring the preservation of magnetic tapes possibly relating to the Section 265 reports); VII (rejecting petitioners' request to toll the May 4, 1988, deadline for applying for legalization, requiring further publicity of the court's orders, and retaining jurisdiction); VIII (protective order); IX (requiring dissemination of forms permitting aliens to explain any failure to file a timely application for legalization); and X (scheduling order). Pet. App. 128a-139a. On September 27, 1988, the court stated that it would appoint a Special Master to find facts and recommend what relief, if any, would be appropriate for aliens who failed to file a timely application for legalization because of the INS's invalidated "known to the Government" interpretation, and, on October 28, 1988, a Special Master was appointed. *Id.* at 140a-150a. The government challenged the appointment of a Special Master by petitioning for mandamus, but the D.C. Circuit denied the petition. *In re Thornburgh*, 869 F.2d 1503 (1989) (reproduced at Pet. App. 166a-195a). Other disputes continued to percolate, prompting still more orders. These disputes included the INS's alleged noncompliance with prior orders, Pet. App. 151a-157a, fee requests for the Special Masters, *id.* at 158a-165a, and attorney's fee requests, Orders, No. 88-0625 SS (Apr. 4, 1989, July 17, 1989) (ordering interim fee disbursements to petitioners' counsel).

order (after the regulation had been applied)—"it follows that the district court lacked jurisdiction to hear the same claim in a different forum." Pet. App. 16a.

The court also held that the organizational plaintiffs, even if serving as "qualified designated entities" to receive legalization applications (see note 2, *supra*), could not invoke the district court's jurisdiction because to allow such actions would undercut IRCA's jurisdictional scheme and, in particular, its exhaustion-of-remedies requirement. Pet. App. 28a-32a (citing *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984)). The court explained that:

> Congress allowed individual aliens, who undoubtedly have the most direct interest in the administration of IRCA, to challenge unfavorable INS rulings only in the deportation context. It would undermine Congress' system of administrative remedies and its plan for limited judicial review of IRCA determinations, if [qualified designated entities] were able to seek declaratory judgments in the district courts without any applicable exhaustion requirement.

Pet. App. 32a.

In an "alternative holding[],"[] the court ruled that even if the district court had jurisdiction, the INS policy at issue in Supplemental Order V was neither final agency action nor ripe for judicial review. Pet. App. 32a-43a. Applying well-established principles governing the timing of review, the court of appeals examined the fitness of the issues for judicial review, and the hardship to the parties of postponing review. *Id.* at 32a-33a (citing *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967)). After full consideration of the genesis of INS's "known to the Government" rule, the history of litigation in the district court, and the evidence adduced on INS's actual practices with regard to aliens claiming eligibility under Section 265, the court of appeals concluded that INS had not formulated a position on Section 265 claims that was sufficiently crystallized for judicial review. Pet. App. 38a. The court also found that the district court had not identified any irreparable harm

that would accrue to the organizational plaintiffs, and that even if the individual plaintiffs' cases were considered, those plaintiffs would suffer no irreparable injury because they could pursue their claims through the administrative and judicial process that Congress had provided.[6]

Chief Judge Wald dissented, believing that the district court had properly exercised jurisdiction and that INS's actions were ripe for review. Pet. App. 203a-205a. She contended that IRCA's judicial review provisions governed only review of a particular individual's claim to legalization. Consequently, in Judge Wald's view, the district court's general federal question jurisdiction was available for claims challenging the validity of rules. *Id.* at 48a-74a. Judge Wald also would have found the INS policy at issue in the district court's Supplemental Order V to be final and ripe for judicial review. *Id.* at 75a-84a. Finally, she agreed on the merits with the district court's conclusion that the "known to the Government" eligibility criteria included Section 265 claimants. *Id.* at 85a.[7]

DISCUSSION

The petition for certiorari presents two questions. First, the petition challenges the holding of the court of appeals that the district courts lack jurisdiction to review INS regulations governing legalization under IRCA. Second, the petition claims that the court of appeals erred in applying well-settled timing-of-review principles to the particular agency action at issue in this case.

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[6] In a statement filed on the denial of rehearing, Judge Silberman, joined by Judge D.H. Ginsburg, also noted that such aliens did not even risk exposure to the INS by filing a legalization application (and thus preserving their remedies), because IRCA protects against the disclosure of legalization files for any purposes other than to make a determination on the application or for enforcement of the antifraud provisions of IRCA. Pet. App. 200a-201a. See 8 U.S.C. 1255a(c)(5).

[7] In light of the court's opinion, the district court has stayed the Special Master proceedings that were authorized under Supplemental Orders XI and XII (see note 5, *supra*). Order, No. 88-0625 SS (July 26, 1989).

The first question presented (jurisdiction) raises an issue of general importance on which the circuits are divided. In *Haitian Refugee Center, Inc.* v. *Nelson*, 872 F.2d 1555 (1989), petition for cert. pending, No. 89-1332, the Eleventh Circuit held, in construing the virtually identical jurisdictional provisions applicable to the "Special Agricultural Workers" (SAW) legalization program, that the district courts have jurisdiction to entertain challenges to system-wide "policies and practices" of the INS. The holding below is squarely to the contrary. Because of this conflict, and because of the overall importance of this issue to the legalization programs, we have filed a certiorari petition seeking this Court's review of the Eleventh Circuit's decision. *McNary* v. *Haitian Refugee Center, Inc.*, No. 89-1332.[8]

On the other hand, the second question presented in the instant petition (ripeness) does not raise an issue of general importance, and there is no claim of a conflict between the decision below and that of another court of appeals. The court of appeals correctly applied the ripeness and finality principles that the Court has explicated in many prior decisions, and this Court's review is not necessary to ensure uniformity, to provide clarification, or to develop the existing law regarding these issues.

Because one of the two alternative grounds for the court of appeals' judgment does not merit this Court's attention, the Court could deny the present petition outright; reversal of the judgment below would not be required even if petitioners prevailed on their jurisdictional arguments (or if the Court granted our petition in No. 89-1332 and affirmed). Nevertheless, we believe that since the Court's ultimate resolution of the jurisdictional issue may affect the proper disposition of the case, the Court should hold the instant petition for disposition in light of *McNary* v. *Haitian Refugee Center, Inc.*

1. Petitioners' principal contention (Pet. 9-24) is that the court of appeals mistakenly held that IRCA precludes challenges in federal district court to legalization regula-

[8] We have provided a copy of our petition to petitioners here.

tions. Contrary to that view, the court of appeals correctly held that Congress did not intend to permit broadside challenges to INS rules, regulations, or policies through the vehicle of an action in district court.

a. Congress carefully structured the legalization programs—both the general program at issue here and the SAW program at issue in *McNary* v. *Haitian Refugee Center, Inc.* to channel all judicial review of INS determinations to the courts of appeals in the review of a deportation order. The statute provides in all-encompassing terms: "There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection." 8 U.S.C. 1255a (f)(1). In the following paragraphs, the subsection requires the establishment of "a single level of administrative appellate review," and states that "[t]here shall be judicial review of such a denial [of a legalization application] *only* in the judicial review of an order of deportation under Section 1105a of this title." 8 U.S.C. 1255a (f)(3)(A) and (4)(A) (emphasis added). Section 1105a, in turn, requires that a deportation order may be reviewed only in a court of appeals.[9] Congress could hardly have chosen clearer or more forceful language to express its intention to preclude *any* judicial review of a "determination respecting an application" for legalization status, other than in the court of appeals following the entry of a deportation order.

Although couched as a challenge to a rule, petitioners' complaint in essence sought review of a "determination respecting an application" for legalization—indeed, many such applications. As the court below explained, since a regulation governing eligibility for legalization will affect the outcome of a class of individual applications, "the regulation embodies determinations that will impact, and

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[9] 8 U.S.C. 1105a makes applicable the Hobbs Act, 28 U.S.C. 2341 *et seq.*, as the "sole and exclusive" provision for the review of "final orders of deportation," thereby conferring exclusive jurisdiction on the courts of appeals.

therefore are 'respecting,' future individual applications." Pet. App. 13a. Review of the regulation is therefore barred until the regulation is applied in a particular case, and an alien has sought review following the entry of an order of deportation. Compare *Heckler* v. *Ringer*, 466 U.S. 602 (1984). By virtue of the provision for exclusive review in the courts of appeals, petitioners' action cannot be brought in district court.[10]

Petitioners are mistaken in insisting (Pet. 18) that the court of appeals violated the presumption in favor of judicial review of agency action. Rather, the court simply applied the principle that when Congress limits review to the courts of appeals, it does not intend simultaneously to permit the same actions to be reviewed in district court. *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744-745 (1985). Permitting review of rules in the district courts would lead to a "rather peculiar" division of jurisdiction, because the courts of appeals, in reviewing deportation orders, would hear "only the application of the statute in presumably less important individual cases," while district courts would review "the much more important cases involving broad questions of statutory construction that would apply to a whole class of aliens." Pet. App. 12a, 15a. Petitioners' construction (Pet. 19-20) of the statute does not explain this anomaly. Nor do petitioners explain why Congress would have so carefully limited judicial review to aliens who have *final* deportation orders, yet have countenanced anticipatory relief for aliens fortunate enough to have a district judge direct the reopening of their legalization applications (as the district court did here). Such a result would frustrate the requirement of

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[10] Thus, neither the grant of general federal question jurisdiction under 28 U.S.C. 1331 nor the provision in the immigration laws giving jurisdiction to the district courts for "all causes, civil and criminal, arising under any of the provisions of this subchapter" can be read to override the more specific limitations set forth in IRCA. 8 U.S.C. 1329. Cf. *Whitney Bank* v. *New Orleans Bank*, 379 U.S. 411, 419-422 (1965).

exhaustion of administrative remedies (see 8 U.S.C. 1255a(f)(3)), thus depriving the agency of an opportunity to formulate policy, correct its own errors, and determine whether an applicant would, in any event, fail to qualify for legalization.

Other considerations also buttress the decision below. As the court of appeals observed, it "seems inconceivable" that Congress would have closely cabined court of appeals review of INS regulations as applied to particular cases, but would have authorized full-scale Administrative Procedure Act challenges to those same regulations in the district court. *Id.* at 15a-16a. Nor is it plausible that Congress intended district courts to become embroiled in supervising relief for individual aliens who claim to be barred by an invalid INS rule or policy.[11] And, as we explain in our petition for certiorari in *McNary* v. *Haitian Refugee Center* (at 12-17, 20-22), the conclusion that actions like the present one are barred under IRCA is consistent with the decisions of this Court, the legislative history, and the purposes animating the judicial review provisions in IRCA.[12]

Petitioners err in claiming (Pet. 23-24) that the organizational plaintiffs, who are "qualified designated entities" under IRCA, enjoy standing to sue in their own right.[13] "[W]hen a statute provides a detailed mech-

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[11] This case demonstrates that such supervision is a nearly inevitable consequence of district court jurisdiction. Indeed, the district court at one point entertained a motion to hold INS in contempt for denials of legalization issued by the administrative appeals unit to individual applicants. See Pet. App. 151a-156a.

[12] Petitioners attempt to discredit (Pet. 10 n.12) the holding below by suggesting that it would permit INS to restrict legalization to "white (or male, or European) aliens" and be free from all district court review. That suggestion—far removed from the present facts—is of no avail. Congress surely did not fashion its chosen framework for judicial review with such bizarre hypotheticals in mind, and the ability to imagine them provides no reason to depart from Congress's evident intention to cut off all district court review —an intent that is plain from the language and structure of IRCA.

[13] Petitioners appear to have abandoned any claim that organizations that simply advise aliens, but are not "qualified designated

anism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349 (1984). Although there is ordinarily a presumption favoring judicial review, it is overcome "whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Id.* at 351 (quoting *Data Processing Service* v. *Camp*, 397 U.S. 150, 157 (1970)). Those principles are applicable here. Although Congress provided for "qualified designated entities" in order to encourage aliens to come forward and apply for legalization, it did not designate them as litigation agents for aliens. To allow such groups to sue would permit circumvention of the contemplated layer of administrative review within INS, thus preventing INS from fleshing out its regulations as applied to particular cases. Moreover, IRCA was not designed for the benefit of those groups, and it affords them no special protection. Their legal claims essentially duplicate the claims of legalization applicants. Under these circumstances, the court of appeals correctly held that Congress did not authorize the organizational plaintiffs to sue.

b. We agree with petitioners (Pet. 10-13) that the decision below conflicts with *Haitian Refugee Center, Inc.* v. *Nelson*, *supra*. In that case, as here, organizational plaintiffs (including a "qualified designated entity") and individual SAW program applicants challenged alleged system-wide INS procedures for adjudicating applications for SAW status. The plaintiffs urged that the so-called "policy and practice" exception to 8 U.S.C. 1105a, recognized in *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984), aff'd on other grounds, 472 U.S. 846 (1985), and *Haitian*

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entities," can properly sue under IRCA. Moreover, the questions whether *individual* aliens may sue, and whether the organizations here enjoy standing to assert their interests, are not properly presented in this Court because the district court never ruled on those issues (see Pet. App. 109a n.9).

Refugee Center (HRC) v. *Smith*, 676 F.2d 1023 (5th Cir. 1982), should be extended to apply to IRCA as well. Endorsing that approach, the Eleventh Circuit held, 872 F.2d at 1560, that such a challenge could be brought in federal district court notwithstanding the limited provisions for judicial review set forth in 8 U.S.C. 1160(e) (the counterpart in the SAW program to 8 U.S.C. 1255a(f)).

As petitioners indicate (Pet. 12), the Eleventh Circuit's holding is "diametrically opposed" to the holding of the court of appeals here. In each case, the critical issue was whether the general federal question jurisdiction of the district courts was available for a challenge to "rules" or "policies," despite the detailed provisions governing judicial review in IRCA. The language of the applicable IRCA provisions is virtually identical. Compare 8 U.S.C. 1255a(f) (general legalization program) with 8 U.S.C. 1160(e) (SAW program). Although the decision below involved an APA challenge to a rule promulgated by the INS, and the plaintiffs in *Haitian Refugee Center, Inc.* v. *Nelson*, *supra*, challenged policies that were alleged to be tantamount to rules, we agree with petitioners that the cases are not distinguishable on that basis.

c. We do not agree, however, with petitioners' assertion (Pet. 13-15) that the decision below implicitly conflicts with this Court's decision in *Jean* v. *Nelson*, 472 U.S. 846 (1985). In *Jean*, the court of appeals had upheld the district court's exercise of jurisdiction under the "policy and practice" exception to 8 U.S.C. 1105a, rejecting the government's claim that such an exception was incompatible with the statute. 727 F.2d at 980 & n.32. This Court granted review on the aliens' petition, and affirmed without consideration or discussion of the jurisdictional issue.[14]

[14] The question presented by the petition in *Jean* was whether unadmitted aliens could invoke the equal protection guarantee of the Fifth Amendment's Due Process Clause. This Court, in affirming, did not reach that question because it found that nonconstitutional grounds for decision should be considered further on remand. 472 U.S. at 853-857.

Petitioners err in contending (Pet. 15) that by "its ultimate conclusion" the Court in *Jean* "clearly" agreed with the Eleventh Circuit's jurisdictional holding; such an inference would read far too much into the Court's silence. The issue of jurisdiction was not presented in the aliens' petition for certiorari, and the government did not cross-petition. Moreover, the government did not brief the jurisdictional issue, and the Court's opinion did not advert to it.[15]

In any event, the issue here is not whether there is a "policy and practice" exception to 8 U.S.C. 1105a. This case concerns the specific jurisdictional language contained in IRCA. In IRCA, Congress employed language even broader than that in Section 1105a, expressly limiting judicial review of all claims on "a determination respecting an application" to petitions for review of an order of deportation. That language incorporates the judicial review apparatus applicable to deportation cases, but goes farther by adding an explicit prohibition on any other form of judicial review. Consequently, if there had been any doubt about the result under Section 1105a standing by itself, Congress removed it. As the court below recognized, "whatever the proper interpretation of [Section 1105a] as it relates to 'final orders of deportation,' IRCA's judicial review provisions, although employing the [Section 1105a] machinery, have a broader preclusive effect." Pet. App. 25a.[16]

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[15] While we recognize that courts have an independent obligation to examine such jurisdictional issues, compare *FW/PBS, Inc.* v. *City of Dallas*, 110 S. Ct. 596, 607-608 (1990), the circumstances of the Court's resolution in *Jean* v. *Nelson* cannot be read as a blanket endorsement of the much-disputed jurisdictional theory espoused by the court of appeals. In our petition for certiorari in *McNary* v. *Haitian Refugee Center, Inc.* (at 22-25), we describe our reasons for disagreeing with the theory of *Jean*, and the prior court of appeals decision on which it rests, *HRC* v. *Smith*.

[16] For that reason, the cases cited by petitioners as allowing review outside the scope of Section 1105a (Pet. 16), and this Court's cases construing Section 1105a (Pet. 17 & n.19), are not helpful to them.

2. Petitioners also challenge (Pet. 25-30) the alternative holding of the court of appeals—that the asserted policy of INS regarding nonimmigrants who had failed to file a required report under Section 265 was neither final nor ripe for purposes of judicial review. That holding, which simply applied accepted timing-of-review principles to the district court's Supplemental Order V, was correct and does not warrant the attention of this Court. Indeed, petitioners acknowledge (Pet. 25) that their ripeness challenge depends on showing that "[t]he majority's position * * * is based upon glaring misconceptions about the facts and the procedural history of the case." The convoluted proceedings in the district court and the particular details attending the evolution of INS's "known to the Government" rule were painstakingly examined by the court of appeals, and its factbound analysis surely does not merit this Court's review. Likewise, petitioners' claim (*ibid.*) that the court below "distorted" finality principles simply quarrels with the application of well-settled law to the particular agency action under review.

a. The underpinnings and proper application of the ripeness doctrine were explained in *Abbott Laboratories* v. *Gardner*:

> [I]ts basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

387 U.S. at 148-149. The court of appeals properly applied those considerations here.

After the district court invalidated INS's interpretation of the phrase "known to the Government" on the basis that the phrase did not mean "known to the INS,"

and INS did not appeal from that ruling, INS had no articulated policy regarding Section 265 claims. Indeed, even the district court failed to focus on whether, under its ruling, the *absence* of a required filing with the government could cause the government to have knowledge of an alien's unlawful status. In its first supplemental order, the court stated that an alien seeking to qualify under the "known to the Government" provision had to show that prior to January 1, 1982, "*documentation* existed in one or more government agencies," which, taken as a whole, established the alien's unlawful status. Pet. App. 123a (emphasis added). The court gave no hint that the *absence* of documentation might yield the same result. In Supplemental Order V, however, the court ruled that the absence from INS's files of a required filing under former Section 265 could also satisfy the "known to the Government" requirement. Prior to that ruling, INS had expressed no definitive view on the matter.[17]

The court of appeals rejected petitioners' arguments that, on the basis of a few denials recommended by certain Legalization Offices on particular applications, INS had developed a "final" policy on the Section 265 issue. Pet. App. 34a. The court pointed out that such recommendations were inherently subject to further ac-

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[17] Although INS's original rule could be read to foreclose nearly all aliens from claiming under a Section 265 theory, that rule was never interpreted or applied by INS's administrative appeals authority. Moreover, the original rule was not informed by the principles later articulated by the district court as underlying the "known to the Government" provision. The district court found that the provision was justified as an evidentiary rule (to cut off fraudulent claims by a nonimmigrant that he had violated the terms of his visa prior to 1982). Pet. App. 117a. Because INS did not appeal from the district court's order interpreting the "known to the Government" provision, there was ample cause to believe that INS would rethink its entire approach to the provision, including its application to Section 265 claims.

tion, and thus were not final. *Ibid.* (citing *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 241 (1980)).[18]

The court also found that the alleged INS policy underlying the Section 265 claims was not ripe for review. The Section 265 question involved a complex mixture of technical issues of fact regarding INS's record-keeping policies and issues of law regarding the circumstances under which an alien's failure to file a report would render him in an unlawful status that was known to the government. Indeed, the court below held an evidentiary hearing to learn about INS's record-keeping practices. Congress had not "directly addressed the precise question" of the status of Section 265 aliens; hence, resolution of the question was committed to the agency, whose judgment must be upheld if it is a "reasonable interpretation" of the statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). With those principles in mind, the court found "compelling reasons for postponing judicial intervention" because INS had not definitively resolved ambiguities surrounding application of the "known to the Government" standard to aliens who failed to make a required filing under Section 265. Pet. App. 42a.[19] That holding fully accords with principles routinely applied in the lower courts in determining whether an administra-

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[18] In addition, the court noted that after the district court had decided the only claim in petitioners' complaint—that "Government" did not mean solely the INS—"the court's retention of jurisdiction and continuing 'supervision' of INS's administration of the program was not an appropriate exercise of judicial power vis-a-vis the government." Pet. App. 35a. The court of appeals pointed out that the district court "did not thereby gain jurisdiction to decide whatever new variations could be presented on the 'known to the Government' theme as if it were the administrator of the program." *Id.* at 36a.

[19] In an effort to refute the court's reading of the record, petitioners rely (Pet. 26-27) on the contents of communications by INS that, they claim, establish that INS had a definitive policy. But those materials were not authoritative, and INS had not issued a regulation or rendered a decision on a Section 265 claim through its administrative appeals authority.

tive policy in the process of being developed is "fit" for review.[20]

Petitioners also failed to establish any hardship that would have justified ignoring the inchoate status of INS's policy. As the court of appeals noted, the district court never finally resolved whether the individual plaintiffs had standing, and no class was ever certified. Thus, claims of hardship to the individual applicants were not properly presented. In any event, the "hardship" faced by applicants was the prospect of applying for legalization, with a likelihood of denial, and of pursuing judicial review (in deportation proceedings) if their claims were in fact rejected. That is not sufficient. Pet. App. 42a-43a. If the "burden" of paying a filing fee and pursuing appropriate channels of review were adequate showings of hardship, few claims to an immediate ruling would fail. Compare *Heckler* v. *Ringer*, 466 U.S. at 625-626 (claimant cannot obtain advance ruling on whether surgery is reimbursable under the Medicare Act, even if the surgery cannot be obtained without the assurance of payment).

Nor was the "perplexing dilemma" (Pet. 30) faced by qualified designated entities"—whether or not to advise aliens to apply for legalization—an adequate allegation of hardship. No doubt many organizations and individuals would benefit from clarification of an agency's view of the law in order to give better advice to others.

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[20] See *Natural Resources Defense Council, Inc.* v. *Thomas*, 845 F.2d 1088, 1092-1093 (D.C. Cir. 1988) (claim not ripe because agency had no chance to conduct a proper "rulemaking"); *Cablevision Systems Development Co.* v. *Motion Picture Ass'n*, 836 F.2d 599, 614-615 (D.C. Cir.) (claim not ripe because rulemaking had not addressed disputed issue and no final agency interpretation was made, even though agency's general counsel had issued an interpretation), cert. denied, 108 S. Ct. 2901 (1988); *Action Alliance of Senior Citizens* v. *Heckler*, 789 F.2d 931, 941 (D.C. Cir. 1986) (claim not ripe when court would have to anticipate how the agency might exercise discretion in applying a regulatory standard to particular facts). See also 5 J. Stein, G. Mitchell & B. Mezines, *Administrative Law* § 48.01, at 48-3 to 48-6 (1988 & Supp. 1989) (collecting cases).

Such claims of confusion about the state of the law are not "sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Abbott Laboratories* v. *Gardner*, 387 U.S. at 152. Moreover, "[a] claimed hardship that results 'not from delay in *enforcement* of an established standard, but from delay in *establishment* of a standard' is generally not a reason for prompt judicial action." Pet. App. 43a (quoting *Public Citizen Health Research Group* v. *Commissioner*, 740 F.2d 21, 31 (D.C. Cir. 1984)). The organizational plaintiffs' interest in immediate clarification of the application of INS's rules did not furnish an adequate reason to deprive the agency of an opportunity to formulate its policy in a considered fashion.

b. Thus, the alternative (ripeness) ground of the court of appeals' judgment does not merit review here.[21] We believe, however, that the instant petition should be held pending this Court's disposition of *McNary* v. *Haitian Refugee Center, Inc.*, *supra*. If the Court grants review in *McNary* and affirms the judgment in that case, it may wish to grant the petition here, vacate the judgment, and remand to the court of appeals for further consideration. Although the court of appeals reached its ripeness holding based on independent and well-settled principles, the appropriateness of outright dismissal (as opposed to some limited retention of jurisdiction by the district court) might be affected if this Court were to hold that Congress intended district courts to entertain rule-based challenges under IRCA. On the other hand, if the Court grants review in *McNary* and reverses the judgment, holding that IRCA precludes the exercise of jurisdiction by the district courts, the petition in this case should be denied.

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[21] The Court should not grant certiorari here to review the jurisdictional issue alone, because even if petitioners were to prevail on that issue, the ripeness holding of the court below would be sufficient to sustain its judgment. In addition, the petition in this case fails to present several standing issues (see note 13, *supra*) that are integrally bound up with the jurisdictional question. Those issues are properly presented in *McNary*.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of *McNary* v. *Haitian Refugee Center, Inc.*, No. 89-1332.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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